

DHS ENFORCEMENT PRIORITIES UPDATE

JULY 22ND 2022

Another federal court has issued a ruling against DHS enforcement policies. Below is a quick summary and FAQ to help you keep up.

On Friday, June 10, a federal court in Texas issued a [ruling striking down the Mayorkas Enforcement Priorities memo, effective nationwide](#). The case is now pending before the Supreme Court, but for the time being, the Mayorkas memo is NOT in effect. These are the latest developments in a [long-running case](#) that involved first the interim enforcement priorities and then the final priorities memo that took effect in Nov. 2021. More background on those policies is available at the bottom of this FAQ.

The current status of the Mayorkas memo is that it is not in effect. It has been vacated by the Texas district court. On July 6, the Fifth Circuit Court of Appeals [refused to issue a stay of the ruling](#), and the federal government appealed that to the Supreme Court, which has also rejected the stay request. Arguments on whether the states have standing to bring the lawsuit and whether the district court was right to vacate the Mayorkas Memo are scheduled before the Supreme Court in December.

WHAT DOES THIS MEAN FOR DHS ENFORCEMENT POLICY?

The decision from the district court returns DHS policy to the way it was before the Mayorkas memo was issued. That means that DHS officers still have broad discretion to make enforcement decisions, and they can still exercise prosecutorial discretion, but they no longer have central guidance on how to use that discretion. The three enforcement priority categories described in the Mayorkas memo are no longer in effect.

DOES DHS NO LONGER HAVE ANY PROSECUTORIAL DISCRETION?

DHS still has prosecutorial discretion, but the guidance to DHS staff in the Mayorkas 9/30/2021 memo is no longer the policy guiding that discretion. The Mayorkas memo dated Sept. 30, 2021 is vacated in its entirety. Other DHS directives are still in effect, including the DHS memos regarding victims of crime, protected areas, military service, parental interests, etc. No other DHS discretion policies are at issue in the litigation, although many of them reference the Mayorkas memo.

CAN I STILL FILE A REQUEST FOR PROSECUTORIAL DISCRETION (“PD”)?

Yes. You can always file a PD request. However, arguments based specifically on the three enforcement priorities described in the Mayorkas memo will not be effective. However, PD requests should still be considered based on positive and negative factors in the case. *Regardless of the court’s decision, advocates can continue filing PD requests where appropriate for their clients.*

- The Doyle Memo, issued in April 2022 by the head of ICE’s Office of the Principal Legal Advisor (OPLA), is significantly affected by this case. OPLA [states on their webpage](#) that: “OPLA attorneys are no longer applying the Mayorkas Memorandum or sections of Principal Legal Advisor Kerry E. Doyle’s memorandum, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (April 3, 2022), that rely on the priority enforcement framework established by the Mayorkas Memorandum when making prosecutorial discretion determinations or for any other purpose. OPLA attorneys, however, may—consistent with longstanding practice—exercise their inherent prosecutorial discretion on a case-by-case basis during the course of their review and handling of cases.”

HOW DOES THIS AFFECT PENDING PD REQUESTS?

It's unclear how DHS will handle pending PD requests based on the Mayorkas and/or Doyle memos. ICE may put them aside and leave them pending until the Supreme Court issues a decision, or agents may decide the PD requests based on their own analysis of positive and negative factors (without basing the decision on the Mayorkas memo.) Pending requests based on the memos would be granted only if DHS decides in a particular case that PD is still warranted based on general equities in the case.

WHAT IS DHS REQUIRED TO DO?

The district court judge did not order DHS to take any specific action. He only vacated the Mayorkas memo from September 2021. This leaves DHS with all of its statutory and regulatory powers of discretion, but as if the Mayorkas memo and its priorities had never been issued.

Context on This Ruling

Last September, DHS issued [new enforcement priorities](#) that affect immigration enforcement across the country: [Guidelines for the Enforcement of Civil Immigration Law](#). This policy took effect on November 29, 2021. Prior to these guidelines, DHS had issued a set of [interim priorities](#), which were [challenged in court](#), but after some competing rulings, remained in effect until November 29, 2021.

Two federal lawsuits have challenged the authority of DHS to apply the new (final) enforcement priorities to immigration operations, one in Texas and one in Ohio. Both sought injunctions to have any application of the memo put on hold while the litigation continued. The Ohio district court [issued an injunction](#) limiting the enforcement priorities on March 22, 2022, but the Sixth Circuit [overruled that injunction](#). In 2021 the Texas district court had also issued a preliminary injunction, most of which was stayed by the Fifth Circuit. Now, the Texas district court has struck down the Mayorkas memo on the merits, and the Supreme Court has granted certiorari to review the case.

Further Resources:

For more information about DHS enforcement priorities under the Biden administration and how practitioners can use these policies to advocate for their clients, please see the following resources:

- Quick summary of the final enforcement priorities memo: <https://www.ilrc.org/dhs-enforcement-priorities-update>
- Practice Advisory on the Doyle Memo for PD in removal proceedings: <https://www.ilrc.org/advocating-prosecutorial-discretion-removal-proceedings-under-doyle-memo>
- Practice advisory on DHS priorities for immigration attorneys: <https://www.ilrc.org/practice-advisory-immigration-advocates-final-enforcement-priorities>
- Practice Advisory on DHS priorities for criminal defense attorneys: <https://www.ilrc.org/practice-advisory-criminal-defense-attorneys-final-enforcement-priorities>

